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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 263

FLORENCE PRINTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–21a) is not yet reported. The Board's decision and order (J.A. 96–144)[1] are reported at 158 NLRB No. 1.

JURISDICTION

The decision and judgment of the court of appeals (Pet. App. 1a–15a) were entered on March 21, 1967. The petition for a writ of certiorari was filed on June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." references are to the joint appendix filed in the court of appeals.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer failed to prove, as a defense in mitigation of a backpay award, that the backpay claimants had willfully incurred losses of earnings.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set forth in the Appendix, *infra*, p. 11.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

In *Florence Printing Co.*, 145 NLRB 141, the Board found that the petitioner (a South Carolina printer) had unlawfully refused to bargain with the Union,[2] the representative validly designated by a majority of its employees, and that a strike by petitioner's employees as a result of this refusal was an unfair labor practice strike. The Board ordered petitioner to bargain with the Union, to offer reinstatement to the unfair labor practice strikers within five days of their application, and to make them whole for any losses of pay resulting from the failure to make such reinstatement. The Fourth Circuit enforced the Board's order in full. *Florence Printing Co.* v. *National Labor Relations Board*, 333 F. 2d 289.

On July 7, 1963, following the Board's order, the unfair labor practice strikers unequivocally applied for reinstatement, but they were not reinstated until June 30, 1964 (J.A. 93; 3–4). The Board instituted the

[2] Charleston Typographical Union No. 43.

instant proceeding, pursuant to Section 102.52 *et seq.* of its Rules and Regulations (29 C.F.R. § 102.52), to determine the amounts of back pay due to these employees.

At the hearing the parties stipulated the amounts of net back pay due each claimant, subject to certain affirmative defenses which petitioner sought to establish in mitigation of these amounts, and also stipulated the amount of strike benefits received by each claimant from the Union (J.A. 99–100; 102–103; 4–13).[3] Petitioner then presented the following evidence in support of its affirmative defense that the claimants had willfully incurred losses of earnings: general proof that the local newspaper had advertised job openings for clerks, store managers, and filling station workers, at $40 to $65 per week, during the backpay period (J.A. 137, 21);[4] that claimant Glenn Johnson had refused to accept a job in a town 100 miles from Florence during the backpay period (J.A. 135–136; 51–57, 22–24);[5] that Johnson, upon register-

[3] Pursuant to its constitution and by-laws, the Union paid strike benefits to members participating in an authorized strike (J.A. 103–105). These benefits were paid from a fund compiled by taxing all members of the International Union (J.A. 103–104, 108–109). A striker received no benefits if he inexcusably refused interim employment, and, if he obtained interim employment, his benefits were reduced by one-fourth for each day's work performed in excess of one shift (J.A. 105).

[4] The claimants involved here were either journeymen or apprentice printers. Journeymen printers at petitioner's plant received $96 per week at the time of the events herein (J.A. 139; 19–20).

[5] Petitioner also showed that claimant Bass refused to accept an equivalent job. This offer was not made during the backpay period, however, but before the employees abandoned the strike and applied for reinstatement (J.A. 129–135; 26). Bass was denied back pay for other reasons (J.A. 142–143).

ing at the State Employment Security Commission during the backpay period, informed officials there that he had applied for work only with petitioner and another newspaper and did not know whether any other claimants had sought other employment (J.A. 39–42). Petitioner did not attempt to show that equivalent jobs for printers were available in the Florence area, and made no attempt to show that the claimants had failed to seek the jobs petitioner contended were available (J.A. 143, 137–138). Nor did petitioner attempt to adduce evidence from the claimants with regard to their search for employment, although all had been reinstated by that time and most of them were present during the hearing (J.A. 18–19, 48–49).

The Board concluded that the evidence adduced by the petitioner was insufficient to prove that any of the claimants had willfully incurred a loss of earnings. It found that petitioner did not show, or even attempt to show, that the claimants did not seek the jobs which petitioner contended were available and equivalent, or any other jobs (J.A. 143, 137–139). The Board further found that claimant Johnson did not incur a willful loss of earnings in declining to accept a job in a town 100 miles distant, since to do so would require him to sell his home in Florence, where he and his wife had lived all their lives, and move with their school-age children to a new town (J.A. 136; 56–57, 52).[4] Accordingly, the Board ordered peti-

[4] The Board also found that strike benefits received by the claimants from the Union's strike fund were collateral benefits, and thus were not "earnings" deductible from gross back pay (J.A. 105–109, 143–144). The court of appeals unanimously

tioner to pay the net backpay amounts as stipulated (J.A. 144, 140, 100).[1]

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with Judge Boreman dissenting) agreed with the Board that there was "lack of evidence to show" a willful loss of earnings on the part of the claimants. Accordingly, the court held that the Board's backpay determination was supported by the record as a whole, and enforced its backpay order in full. (Pet. App. 11a, 15a).

ARGUMENT

Section 10(c) of the Act empowers the Board to award back pay to employees who have been the victims of discrimination. It is plainly established that "[t]he employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period." *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). However, "[s]ince only actual losses should be made good, * * * deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198. The courts of appeals which have con-

agreed with the Board on this issue (Pet. App. 3a–8a), and petitioner expressly "is not now taking issue with that ruling" (Pet. 21).

[1] The Board's order provided for the payment of back pay to 12 employees, in amounts ranging from about $5300 to $3400 (J.A. 100).

sidered the matter all have agreed that the burden is upon the employer to prove that the employee's actual earnings should be adjusted to reflect a willful loss of earnings,[8] and petitioner does not appear to dispute that principle here. Rather, petitioner's basic contention is that the Board and the court below erred in concluding that it had not sustained its burden of

[8] In addition to the decision of the court below in this case (Pet. App. 14a), see *National Labor Relations Board* v. *Brown & Root, Inc.*, *supra*, 311 F. 2d at 453–454; *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 366 F. 2d 809, 813 (C.A. 5); *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 575 (C.A. 5); *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 692 (C.A. 5), certiorari denied, 376 U.S. 911; *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 178 (C.A. 2), certiorari denied, 384 U.S. 972; *National Labor Relations Board* v. *Ellis & Watts Products, Inc.*, 344 F. 2d 67, 69 (C.A. 6); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C.A. 9).

Although accepting the general principle that the burden of proving willful loss is on the employer, there is a disagreement among some of the courts of appeals as to whether the Board's General Counsel is obliged first to produce the discriminatees at the backpay hearing and present testimony regarding their search for interim employment. The court below, accepting the view of the Fifth Circuit in *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, *supra*, 366 F. 2d at 813–14, held that there was no such obligation on the General Counsel (Pet. 14a). But cf. *National Labor Relations Board* v. *Mastro Plastics*, *supra*, 354 F. 2d at 177–178; *National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891–892 (C.A.D.C.). No need exists for this Court to resolve that conflict at this time. As petitioner acknowledges (see n. 9, *infra*), it raised no burden of proof issue in this case. Moreover, as the court below noted (Pet. App. 15a), "many of the affected employees were present at the hearing before the examiner"; "petitioner was well aware of the whereabouts of those not present at the hearing"; and, "[a]t no time did petitioner, through its counsel, evince any desire to examine any employee, except Bass and Johnson [both of whom testified], as to interim earnings."

establishing a *prima facie* case of willful loss.[9] This raises only an evidentiary issue, which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

In any event, the record amply supports the conclusion of the Board and the court below that petitioner failed to sustain its burden of proving willful loss of earnings by the 12 claimants here involved. As the court below pointed out (Pet. App. 10a–11a), the Board found that the publisher of petitioner's newspaper merely testified that there were numerous "Help Wanted" ads "for help in occupations unrelated to the typographical trades, such as store and filling station managers and store clerks," and at salaries substantially below those received by the company's journeymen printers; moreover, there was no showing "that any of the 'want ad' positions advertised in its newspaper were ever personally offered to any of the * * * former strikers or that any offers

[9] Thus, as petitioner states (Pet. 23):

"It is clear from the record that petitioner had established *prima facie* a defense against any requirement that it must pay unmitigated back wages. Not only was that the gist of the petitioner's argument to the [court of appeals], it was expressly stated, and repeatedly so, that the Company had gone forward with the evidence and, in so doing, had produced proof which required rebuttal from the General Counsel to sustain any ruling against the petitioner's contentions. * * * This was summarized with the statement that, 'Since the evidence here affirmatively shows that strikers incurred losses willfully, the Company does not need to rely on the authority of [the *Mastro Plastics* and *Rice Lake Creamery*] cases to support its position' * * *."

of such positions were ever rejected by [them]." These findings are not undermined by the contentions presently advanced by petitioner.

Petitioner's assertion that claimant Johnson admitted before the State Employment Security Commission that the other claimants "had not sought interim employment" (Pet. 17) is belied by the record; it shows that Johnson stated that he did not know whether or not the others had sought interim employment (J.A. 41).

There is also no merit to petitioner's assertion (Pet. 5, 11, 17, 22, 27) that the Union ordered strikers not to accept other employment during the backpay period. Petitioner points out that the Union would not release claimant Bass to accept a job offer at the Dillon Herald, and that claimant Johnson testified he could not take a job because of his union activities. But, the record shows, and the Board found, that the job offer was not made to Bass during the backpay period, but in April 1963, when the employees were in the midst of their strike activities (J.A. 128–132).[10] Since the company was under no obligation to make the employees whole at the time the Dillon offer was made to Bass, he was under no obligation to take the job and the Union cannot be faulted for encouraging him to continue his strike activities. Moreover, the fact that the Union encouraged an employee not to take another job while the membership was engaged in concerted strike activities does not establish

[10] The employees did not abandon the strike and apply for reinstatement until July 7, 1963, at which time the backpay period began (J.A. 26).

that it would, or did, likewise restrain employees after the strike was abandoned. See *Brown & Root, Inc.*, 132 NLRB 486, 497, enforced, 311 F. 2d 447 (C.A. 8). Similarly, Johnson's testimony that he could not take a job because of his position with the Union was limited to the period when the employees were on strike (J.A. 54–55). There is no indication in the record that he would not accept another job after the strike was abandoned.[11]

There is likewise no merit to petitioner's assertion that claimants Bass, Johnson, Windham and Schuyler "were personally and individually solicited to accept full-time work by The [Dillon] Herald Publishing Company and that they rejected such job offers" (Pet. 9). Herald official Jackson, petitioner's own witness and the man purportedly offering the jobs, testified that *only* Bass was solicited for the job (J.A. 35).

Finally, petitioner's contention (Pet. 6, 21) that the payment of strike benefits encouraged the claimants not to seek work is irrelevant to the issue here. The question to be determined is whether the claimants *in fact* willfully refused to seek substantially equivalent jobs, not why they *might have been* so motivated. The Board found that there was in fact no willful refusal, and its determination in this regard was properly upheld by the court of appeals, as being based on substantial evidence. Accordingly, no further review is warranted.

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[11] In fact, Johnson did consider another job during the backpay period, but declined it because he "was involved here and it was a hundred miles distance" (J.A. 53). Nothing in the record indicates, as petitioner contends (Pet. 21–22), that the Union prohibited Johnson from accepting this job.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 1967.

APPENDIX

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*) is as follows:

> Sec. 10 * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967